

# TRANSCRIPT OF PROCEEDINGS

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

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In the Matter of:

FLORIDA CABLE TELECOMMUNICATIONS  
ASSOCIATION  
V.  
GULF POWER COMPANY

EB Docket No. 04-381

DATE OF HEARING: APRIL 24, 2006 VOLUME: 6

PLACE OF HEARING: WASHINGTON, D.C. PAGES: 624-886

NEAL R. GROSS & CO., INC.  
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WASHINGTON, D.C. 20554

IN THE MATTER OF	)	EB Docket No.
	)	04-381
FLORIDA CABLE TELECOMMUNICATIONS	)	
ASSOCIATION, INC.; COMCAST CABLEVISION)	)	
OF PANAMA CITY, INC.; MEDIACOM	)	
SOUTHEAST, L.C.C.; AND COX	)	
COMMUNICATIONS GULF, L.C.C.,	)	
	)	
	)	Complainants,
	)	
v.	)	
	)	
GULF POWER COMPANY,	)	
	)	
	)	Respondent.

VOLUME 6

Federal Communications Commission  
Hearing Room A, TW A-363  
445 12<sup>th</sup> Street, SW  
Washington, D.C.

Monday,  
April 24, 2006

BEFORE:

RICHARD L. SIPPEL  
Chief Administrative Law Judge

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JUDY EASTERDAY, Technical Advisor

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MICHAEL DUNN	698	701	837	884

<u>EXHIBIT</u>	<u>DESCRIPTION</u>	<u>MARK RECD</u>
A	Michael Dunn Testimony	701

Start Time: 9:09 a.m.

Lunch Break: 11:59 a.m. to 1:17 p.m.

End Time: 3:57 p.m.

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1 P-R-O-C-E-E-D-I-N-G-S

2 (9:09 a.m.)

3 JUDGE SIPPEL: Has everybody given their  
4 appearances to the court reporter? Does he know  
5 everybody that's at the table? All right.

6 This is our first session on the hearing  
7 of testimony in the Florida Cable, in the matter of  
8 the Florida Cable Telecommunications Association,  
9 Inc., et al, versus Gulf Power, the EB Docket No. 04-  
10 381.

11 I'm not going to ask counsel - I know now  
12 pretty much who the lead counsel are.

13 Are there anybody else at the counsel  
14 table who you would want to introduce at this time,  
15 Mr. Kim and Mr. Langley?

16 MR. LANGLEY: Your Honor, I'm Eric Langley.  
17 I'd like to introduce my paralegal, Katy Corbin.

18 JUDGE SIPPEL: Ms. Corbin. All right, Mr.  
19 Seiver.

20 MR. SEIVER: Thank you. I wanted to  
21 introduce Michael Rose who is counsel for the Florida  
22 Cable Telecommunications Association.

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1 JUDGE SIPPEL: Mr. Skagen?

2 MR. SEIVER: Michael Gross.

3 JUDGE SIPPEL: Michael Gross.

4 MR. SEIVER: Thank you.

5 JUDGE SIPPEL: I've got a few  
6 preliminaries. And let me start with - well let me  
7 start with first of all what's going to be  
8 accomplished this morning. We're going to start with  
9 the testimony of Mr. Dunn; that's the order of  
10 business.

11 I have as a first preliminary matter,  
12 there was a motion filed on Friday by Gulf Power  
13 regarding the testimony, the proposed testimony, of  
14 the complainant's expert, Patricia Kravtin. Am I  
15 pronouncing that right, Mr. Seiver?

16 MR. SEIVER: Yes, you are, Your Honor.

17 JUDGE SIPPEL: And I know I understand Mr.  
18 Seiver's concerns in terms of timing. I'd like to get  
19 to that right now.

20 Will she be testifying Wednesday or  
21 Thursday, do you know?

22 MR. LANGLEY: Well, Your Honor, we had

1 talked to opposing counsel about her schedule. And  
2 she is going to be out of the country after Saturday.  
3 So I asked for an accommodation if she could testify  
4 out of order this week. And I didn't know how much  
5 time they would need to cross-examine her. Thursday,  
6 as long as she was off by the end of the day Thursday  
7 that would be fine.

8 JUDGE SIPPEL: Well, can we start her in  
9 the morning on Thursday? I'm assuming you've talked  
10 to counsel about this.

11 MR. LANGLEY: I have before. And if we  
12 could do that, we could start her on Wednesday. She  
13 will be here tomorrow evening, or sorry, this evening.  
14 So we could start her even earlier if necessary.

15 I didn't want to interfere too much with  
16 their case - well, I'd like to interfere with their  
17 case, but not interfere with the order of their case.

18 JUDGE SIPPEL: I see. I'll just leave it  
19 all to you, then, to tell me - give me a day's notice  
20 anyway when you think you're going to put her on.

21 I'm assuming that we are going to move  
22 this along without too much of a problem this morning.

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1 I mean when I say this, I mean Mr. Dunn's testimony.

2 MR. LANGLEY: Thursday morning is fine for  
3 us. We can plan on it, and if we need to change based  
4 on the speed of the hearing then you and I can talk  
5 about it.

6 JUDGE SIPPEL: Well, let's plan on  
7 Thursday morning, then, at 9:00 o'clock, Ms. Kravtin  
8 will be on the stand. And in the meantime, in the  
9 meantime, what to do with the motion.

10 I would like to see an opposition. But I  
11 am not really treating this as I would in the normal  
12 context of a motion. This is really an objection to  
13 certain aspects of her testimony.

14 But since Gulf Power has proceeded by  
15 motion papers, which I have read, you certainly are  
16 entitled to give me your position in writing, which I  
17 will read also. Or you have an option; you can, when  
18 it comes time to raise the objection, you can answer  
19 the points of the motion orally.

20 I don't want to put you at a disadvantage  
21 because you have to do pleadings in the middle of a  
22 hearing.

1 MR. SEIVER: Your Honor, as long as we  
2 could have something - I don't want to say close of  
3 business on Tuesday, but sometime before the end of  
4 the day on Tuesday so we would be able to email an  
5 electronic version of an opposition.

6 JUDGE SIPPEL: That would be fine. That  
7 gives me then Wednesday to look at it in between  
8 witnesses or something; Wednesday night to look at it.

9 And she will be on the stand on Thursday  
10 morning. Then what I intend to do is, to the extent  
11 I feel I'm comfortable doing it, I'll rule on the  
12 points that are raised in the motion -- in Gulf  
13 Power's motion.

14 I'll reserve what I feel I want to  
15 reserve, and I'll decide what I feel I can decide, all  
16 right?

17 Now point number two is, please, no more  
18 motions unless you come to me first. You can let me  
19 know on the record during the course of a hearing, or  
20 you can give it to me in a one-page email, that it's  
21 coming, that you intend it to come. But give me a  
22 chance to tell you whether or not I want to receive

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1 it.

2 Okay, what I don't - what I'm waiting for  
3 is a copy of Mr. Dunn's transcript - not transcript,  
4 I'm sorry, his proposed written testimony.

5 Is there any other preliminary business  
6 that anybody wants to raise right now?

7 MR. LANGLEY: Your Honor, we had raised at  
8 the document admission session the question of making  
9 some brief opening remarks.

10 I believe it is Mr. Seiver's intent to  
11 make some, and I also would like to make some.

12 Is that acceptable?

13 JUDGE SIPPEL: That's fine, sure.

14 MR. LANGLEY: May I proceed?

15 JUDGE SIPPEL: Well, wait just a minute.  
16 Let's see if there is anything else.

17 Is there anything else of a preliminary  
18 nature?

19 No? You set to go?

20 MR. LANGLEY: We're set to go.

21 JUDGE SIPPEL: All right, you may proceed,  
22 Mr. Langley.

1 OPENING STATEMENT ON BEHALF OF RESPONDENT GULF POWER

2 MR. LANGLEY: Your Honor, thank you, and  
3 may it please the Court:

4 I know that Your Honor has read the trial  
5 briefs, and I'll attempt to eliminate any redundancy.

6 But as you can see from the trial briefs,  
7 this is in some ways the tale of two cases. The  
8 parties have widely divergent views as to how this  
9 should work.

10 We believe the solution should be simple,  
11 practical, and something that the bureau and the  
12 commission can apply.

13 The complainants, on the other hand,  
14 believe that this should be complex and unmeetable.

15 We submit, Your Honor, through the course  
16 of this proceeding, with the proof that we offer, we  
17 will demonstrate to the court that our method is the  
18 preferred one, and the one that is consistent with the  
19 law.

20 To understand where we are, though, it's  
21 important to understand how we got here. And this all  
22 began in 1978 with the original pole attachment. And

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1 I'm not going to do a long expose on the history, but  
2 there are a couple of brief points that are very  
3 important to put in context with what we're doing  
4 right now.

5 In 1978 Congress stepped in and said, this  
6 is a new industry. We like what they're doing. We  
7 want to give them a boost. And so they set a  
8 regulated rate -

9 JUDGE SIPPEL: What's the industry?

10 MR. LANGLEY: Cable industry, which was  
11 very new at the time. They stepped in, said, we want  
12 to give them a beneficial rate, a favorable rate to  
13 help grow this industry. And this was back in 1978.

14 But importantly in 1978 utilities like  
15 Gulf Power had the option of turning the cable  
16 companies away. It was a voluntary access regime.  
17 And so things rocked along until 1996, and then in  
18 1996 Congress made some very, very important changes  
19 to the pole attachment rule.

20 First of all they said that access is now  
21 mandatory. But in making that change, and in creating  
22 a taking, what they did not do is change the rate -

1       except that they gave telecommunications carriers,  
2       which is a slightly different service than cable, but  
3       an attachment that is no different, a different rate.

4               So we're talking about a physical  
5       attachment that is identical to what the cable  
6       companies attach to Gulf Power's poles, but a  
7       different rate.

8               And in 1996 Congress in discussing what  
9       they were doing with these changes to the act  
10       commented on the 1978 formula, and said this formula,  
11       developed in 1978, gives cable companies are more  
12       favorable rate for the attachment than other telecom  
13       providers.

14               The beneficial rate to cable companies was  
15       established to spur the growth of the cable industry  
16       which in 1978 was in its infancy.

17               This is a quote from the legislative  
18       history, and I apologize to the parties and Your Honor  
19       for the typos in there, but the quote that I read is  
20       accurate.

21               And so after the 1996 act utilities were  
22       faced with a decision here.    There is a taking.

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1 Utilities believe they're entitled to just  
2 compensation. And so they terminated, at the  
3 expiration of the existing pole attachment agreements,  
4 those agreements, and said from here on out, access is  
5 mandatory.

6 Congress even recognized that there were  
7 good reasons for the utility to start denying access.  
8 That was one of the reasons they stepped in and said,  
9 hey, we're going to make this mandatory. And if they  
10 had changed the rate at that time, if they had done  
11 something that brought this closer to just  
12 compensation, closer to fair market value, I don't  
13 think we'd be here today.

14 So there were parallel proceedings filed  
15 by two of the Southern subsidiaries, one, Alabama  
16 Power, and the other, Gulf Power.

17 JUDGE SIPPEL: Subsidiaries of what?

18 MR. LANGLEY: Of the Southern Company,  
19 which is an investor-owned electric utility.

20 JUDGE SIPPEL: So Southern Company is the  
21 entity, the parent company, for Gulf Power?

22 MR. LANGLEY: That is correct.

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1 JUDGE SIPPEL: And also for Alabama Power?

2 MR. LANGLEY: That is correct.

3 JUDGE SIPPEL: Thank you.

4 MR. LANGLEY: They are two different  
5 operating companies, but they are both part of the  
6 Southern system.

7 Both Alabama and Gulf terminated their  
8 contracts in the year 2000, which led to complaint  
9 proceedings filed by the FCTA against Gulf Power, and  
10 filed by the ACTA, the Alabama Cable  
11 Telecommunications Association, against Alabama Power.

12 For whatever reasons the Alabama Power  
13 case was resolved sooner, and it went through the  
14 courts, and as we all know, it gives us the Alabama  
15 Power - the FCC case.

16 Everyone in this room acknowledges that  
17 this is a very important case that applies to this  
18 proceeding. Gulf Power may not like what it says, but  
19 we recognize that for the purposes of this proceeding,  
20 we have to live with what it says.

21 But the parties, here again, differ  
22 sharply in exactly what Alabama Power v. FCC says, and

1 incidentally, in what it does not say.

2 Most importantly, Alabama Power v. FCC  
3 injected into takings law a new term of art, a term  
4 prior to this case never used in takings jurisprudence  
5 - the term, nonrivalrous.

6 And as Your Honor can see on the screen  
7 right now, the court defined nonrivalrous to mean that  
8 use by one entity does not necessarily diminish the  
9 use and enjoyment of others.

10 It's an important definition. Economic  
11 texts - well, let me step back for a second. While  
12 this is new to takings jurisprudence, the concept of  
13 a nonrivalrous good is not new to economics. And  
14 there is a textbook written by the now-Chairman of the  
15 Federal Reserve, Ben Bernanke, who offers this  
16 definition of a nonrival good: A good whose  
17 consumption by one person does not diminish the  
18 availability for others - again, an important  
19 consideration in what we are doing this week, and in  
20 what Gulf Power's evidence will show.

21 If you look at the economic text, they  
22 plot rivalry on a grid so to speak, and the most

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1 rivalrous good the texts usually say is a national  
2 defense, because my enjoyment - my use and enjoyment  
3 of the national defense doesn't interfere with Mr.  
4 Seiver's use and enjoyment of the national defense.

5 But then on the other side of the spectrum  
6 you have the example that most economic texts use is  
7 a soft drink.

8 JUDGE SIPPEL: I'm sorry?

9 MR. LANGLEY: A soft drink, like a Coca-  
10 Cola.

11 JUDGE SIPPEL: Oh, soft drink. Okay.

12 MR. LANGLEY: Because if Mr. Seiver is  
13 drinking the soft drink, I can't drink it.

14 Now I can go down the hall to the vending  
15 machine, get 50 cents out of my pocket, and buy  
16 another one, but I can't drink that soft drink, and  
17 that is a rivalrous good.

18 And so in trying to put this economic term  
19 of rivalry into a real-world application, the Alabama  
20 Power court said that if poles are crowded they become  
21 rivalrous. The exact quote from this case is, the  
22 possibility of crowding is perhaps more likely in the

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1 context of pole space, however, and if crowded, the  
2 pole space becomes rivalrous.

3 So we recognize, and I believe that the  
4 complainants also recognize, that part of our burden  
5 is to prove crowding.

6 Now is that network crowding? Is it  
7 exemplar crowding? Is it pole-by-pole crowding?  
8 There are a number of different ways to look at that,  
9 both practically and with a view towards what the  
10 Alabama Power v. FCC case says.

11 Importantly, though, Alabama Power v. FCC  
12 did not say that all pole space across the country is  
13 rivalrous.

14 Alabama Power did not even say that APCO's  
15 poles were nonrivalrous.

16 What they said, what the Alabama Power v.  
17 FCC court said was that their poles may be - may be -  
18 for practical purposes nonrivalrous.

19 The missing component in that case, and  
20 what leads us here, is that in the Alabama Power v.  
21 FCC case, there wasn't allegation and proof of the  
22 rivalrous nature of the poles.

1 In fact, the court even says that this was  
2 the important unknown fact in the case, that nowhere  
3 in the record did APCO allege that its network of  
4 poles was crowded.

5 Gulf Power is here to allege that its  
6 network of poles is crowded; to prove that its network  
7 of poles is crowded; to show how we intend to prove  
8 that crowding under several different scenarios.

9 Another important point that the Alabama  
10 Power v. FCC test does not stand for is that it  
11 accepted or affirmed the underlying rationale of the  
12 commission. In the complainant's trial brief, and  
13 riddled throughout Ms. Kravtin's proffered testimony  
14 are references to the rationale of the commission in  
15 the case underlying the 11th Circuit decision.

16 But that rationale was rejected. Even  
17 though the Alabama Power court affirmed the holding,  
18 they rejected the rationale.

19 Katy, why don't you pull up the build  
20 pole.

21 To help put this in context - build pole -  
22 to help put this in context, Your Honor, we want to

1 show you an actual diagram of a pole. Go back to the  
2 bare forty.

3 What we have here is an illustration -  
4 this is not something that we are introducing into  
5 evidence. It's something that we are using as a  
6 demonstrative aid. And it begins with a 40-foot pole,  
7 which is by far the most common type of pole out in  
8 the field to which the complainants' are attached, a  
9 40-foot wood pole.

10 A portion of that pole has to go  
11 underground, and the typical rubric is that 10 percent  
12 plus two feet go underground. So on a 40 foot pole,  
13 we're already starting with six feet of it  
14 underground, leaving 34 feet.

15 Well, then you've got to have a certain  
16 amount of space above ground before you start putting  
17 - before you start stringing wire on that pole.  
18 That's called minimum ground clearance. And generally  
19 speaking - and there are some variations from place to  
20 place - but generally speaking that minimum ground  
21 clearance at mid-span is 18 feet. So you've got to  
22 have at least 18 feet, and in many cases more than

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1 that, to accommodate a mid-span clearance requirement  
2 of 18 feet.

3 Go to the polarized pole diagram.

4 What we are showing here, Your Honor, on  
5 the monitor, is an animation of the power supply space  
6 on a 40-foot pole.

7 JUDGE SIPPEL: Forty feet, is that pretty  
8 much the standard, plus or minus a little bit?

9 MR. LANGLEY: Forty feet is the standard  
10 what we call joint-use pole, meaning a pole to which  
11 we expect other parties to attach.

12 Now there are some 35s and there's a  
13 handful of 45s. And occasionally there is a 50, and  
14 in rare cases there is a 30. But the standard joint-  
15 use pole is 40 feet. And so most of the examples  
16 you'll hear us talking about are in fact 40-foot  
17 poles.

18 Now interestingly enough, both sides  
19 submitted example poles with actual data. Mr.  
20 Harrelson went out and took some measurements of  
21 poles. We sent Osmose out to take some measurements  
22 of poles. The average pole height in our example

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1 poles is just a hair over 40 feet. The average pole  
2 height in the poles complainant selected is a little  
3 bit over 30 feet.

4 And one of the things that we -

5 MR. CAMPBELL: Forty-three feet.

6 MR. LANGLEY: What did I say?

7 MR. CAMPBELL: Thirty. It's 43 feet.

8 MR. LANGLEY: Forty-three feet, I'm sorry.

9 The average height of the poles that complainant  
10 selected was a hair over 43 feet.

11 But 40 is our standard.

12 JUDGE SIPPEL: Do you know what percentage  
13 of all the poles in your system are 40-foot poles,  
14 approximately obviously?

15 MR. LANGLEY: The actual percentage of 40s  
16 is slightly less than 50 percent. One of the exhibits  
17 that we've introduced actually shows, based on year-  
18 ending December 31, '04 data, the exact number of  
19 poles of varying heights.

20 Two brackets that I can give you to help  
21 put this in perspective, are these: 75 percent of the  
22 poles in the system are 35s, 40s and 45s. If we

1 expand that to poles between 30 feet and 45 feet, that  
2 is 95 percent of the poles in the system. Ninety-five  
3 percent of the poles in our system are wood poles  
4 between 30 feet and 45 feet long.

5 We think that is important in this  
6 crowding analysis. Ben Bowen will discuss that in  
7 this testimony. Mike Dunn will discuss that in his  
8 testimony.

9 Mike Dunn will also discuss, Your Honor,  
10 another very important part of this crowding analysis;  
11 that is, our - Gulf Power's - joint use agreements  
12 with incumbent local exchange carriers. These are  
13 people like Bell South, Sprint, GTC, your typical  
14 phone carriers, not your competitive local exchange  
15 carriers, not your CLECs, but your incumbent phone  
16 companies.

17 These are people who also own poles, who  
18 contract for specific amounts of space, and with whom  
19 we contract for specific amounts of space.

20 And looking at the picture on the monitor  
21 right now, the green at the bottom represents the  
22 minimum clearance above grade. And of course we can't